

Opinion No. 98-007

Mr. Jeffrey C. Huss
Court Administrator
Maricopa County Justice Courts Administration
1 West Madison
Phoenix, Arizona 85003-2147

May 15, 1998

SYLLABUS:

In order to contract for primary provider defensive driving school services, the Justice of the Peace Courts must comply with the Judicial Procurement Code. It is advisable to award contracts to the four top ranked proposers in accordance with the results of the procurement and evaluation process.

Dear Mr. Huss:

You provided the following information and asked for a legal opinion concerning the questions set forth after the “Facts Presented” below.

Facts Presented

The Justice Courts of Maricopa County, through Maricopa County Materials Management, recently completed a procurement process for defensive driving school services. In response to a Request for Proposals (“RFP”), eight proposals were received from certified driving schools. An evaluation and selection committee scored the proposals according to the criteria stated in the RFP. The committee submitted a recommendation to the Court Administrator for Justice Courts that contracts be awarded to four defensive driving schools to be utilized by all 21 of the Justice Courts.

The recommendation for contract award to four schools out of the eight proposals was based on the evaluation scores earned by the top four, which ranged from 283 to 295 points out of a possible 300 points. The schools that were not recommended for contract award earned scores ranging from 114 to 178 points.

During the Justice of the Peace bench meeting on March 11, 1998, the selection process and the results were explained to the Justices of the Peace. Although the Justices had previously been informed of the procurement process at their November 1997 meeting, at the March 11, 1998 meeting the Justices discussed the process and concluded that a public procurement process was not necessary to secure defensive driving services. The majority of the Justices were of the opinion that all certified schools in Arizona should be eligible to provide service to the courts. The Justices voted to award contracts to all

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eight of the schools who submitted proposals, but to inform traffic offenders that they may attend any certified driving school in the State of Arizona.

Applicable Legal Authority

Specific statutory provisions address the courts' utilization of defensive driving schools.

A.R.S. § 28-3393. Defensive driving school attendance; primary provider

A. An eligible individual who elects to attend a defensive driving school shall attend one of the following within the time allowed by the court:

1. A defensive driving school that is a primary provider for the court having jurisdiction over the civil or criminal traffic offense.
2. If the court does not have a primary provider, any defensive driving school.

B. A court:

1. May select more than one primary provider.
2. May select a primary provider for defensive driving schools using more stringent criteria than required for state certification.
3. On application of an eligible traffic offender, shall permit the offender to attend another defensive driving school on the showing of reasonable justification by the offender. Reasonable justification includes the fact that the offender resides in another area and that attendance at the court's primary provider school creates a hardship on the offender.

A.R.S. § 28-3391. Definition of court

In this article, unless the context otherwise requires, "court" means a juvenile division of the superior court, a justice of the peace court or a municipal court.

A.R.S. § 28-3395(B)(1) requires the Supreme Court of Arizona to "supervise the use of defensive driving schools by the courts in this state."

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Administrative Order No. 97-52 of the Supreme Court of Arizona sets forth the defensive driving program administrative requirements. Paragraph B(1) states:

A municipal, justice or juvenile court may refer any eligible person to any certified defensive driving school or a court may choose to contract with one or more certified primary providers for defensive driving school services. If a court selects one or more primary providers, the court shall have a written contract with each provider. The Director may require specific provisions to be included in each contract. In selecting primary provider(s), the presiding judge must follow the applicable procurement codes and regulations, but the ultimate authority for selection of the primary provider(s) rests with the presiding judge of each court and not with any other governmental entity.

The "applicable procurement code" for procuring defensive driving school services is the "Procurement Policies and Procedures for the Judicial Branch" (referred to herein as the "Judicial Procurement Code" or the "Code") as set forth in Arizona Supreme Court Administrative Order No. 94-38. The Presiding Judge of the Maricopa County Superior Court adopted the Code, making it applicable to Justice of the Peace Courts, pursuant to Rule 3 of the Code.

Rule 3 of the Code provides:

These Rules apply to the Arizona Superior Court, the Justice of the Peace Courts, and the Municipal/Police Courts if adopted by the Presiding Judge of the Superior Court in the county. As used in these rules, the term "Judicial Branch Unit" means any of the above-named courts if adopted by the Presiding Judge of the Superior Court in the county for that court.

Presiding Judge Robert D. Myers issued Maricopa County Superior Court Administrative Order No. 95-49 regarding "Procurement Policies and Procedures for the Judicial Branch Unit in Maricopa County." This Order states that "[i]n accordance with Administrative Order #94-38 of the Supreme Court of the State of Arizona," the Judicial Branch Unit in Maricopa County is "made up of the Superior Court, the office of the Clerk of the Court, the Juvenile Court, the Justice Courts, the Adult Probation Department and the remaining departments of the Court and the Municipal Courts...." (Emphasis added.)

Administrative Order No. 94-30 of the Maricopa County Superior Court expressly addresses the administration of the Justice of the Peace Courts. A memorandum from the Presiding Judge of the Superior Court, Robert D. Myers, to the Presiding Justice of the Peace, R. Wayne Johnson, dated December 11, 1996, entitled "Operational Detail

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Regarding Administrative Order #94-30," provides that the Presiding Justice of the Peace is charged with making management decisions on behalf of the Justice of the Peace Courts.

Based upon the foregoing facts, you have asked the County Attorney's Office the following questions:

Questions Presented and Brief Answers

- 1) Is the vote of the Justices of the Peace at their March 11, 1998 meeting, regarding defensive driving school contracts, binding?

No, the Justice Courts can allow traffic offenders the option to attend any certified defensive driving school only if the courts have not contracted with primary provider schools. Furthermore, pursuant to Maricopa County Superior Court Administrative Order No. 94-30 and the "Operative Detail Regarding Administrative Order # 94-30," the Presiding Justice of the Peace is charged with making management decisions on behalf of the Justice of the Peace Courts. This Office is unaware of any authority which would allow a vote of the Justices to usurp the management responsibility of the Presiding Justice of the Peace.

- 2) Can this vote change the RFP process that has already been concluded via the Judicial Procurement Code?

The vote cannot change the results of the RFP process.

- 3) Is the RFP process an appropriate and/or required method of selecting primary provider defensive driving schools?

Some form of competitive selection process under the Judicial Procurement Code is required to procure the services of primary provider defensive driving schools. The RFP process is best suited to select the most qualified proposers.

- 4) Was the RFP process conducted in an appropriate manner and is it binding on the court?

Based on the information presented, this Office concludes that the RFP was conducted in an appropriate manner and is binding on the court to the extent discussed below.

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- 5) Is there any potential liability if all eight schools are awarded contracts as the bench vote indicates?

If all eight schools that responded to the RFP are awarded contracts, the highest ranked proposers may protest that such a blanket award is contrary to the intent of the RFP to award contracts to the most qualified proposers.

Analysis

In answer to your third question, in exercising its authority under A.R.S. § 28-3395(B)(1) to supervise the courts' use of defensive driving schools, the Supreme Court of Arizona determined that if the Justice of the Peace Courts enter into primary provider contracts, the applicable procurement code must be followed and the Presiding Justice of the Peace is charged with selecting the primary providers:

In selecting primary provider(s), the presiding judge must follow the applicable procurement codes and regulations, but the ultimate authority for selection of the primary provider(s) rests with the presiding judge of each court and not with any other governmental entity.

Supreme Court of Arizona, Administrative Order No. 97-52, para. B(1).

Once the Presiding Justice of the Peace selects the primary providers, the Justice of the Peace Courts must utilize those primary providers pursuant to A.R.S. § 28-3393(A)(1).

Rules 23 through 29 of the Code set forth the required steps for conducting a procurement utilizing the RFP process. Regarding contract award, Rule 29 states in part that:

The contract shall be entered into with the responsible offeror whose proposal is determined in writing to be the most advantageous to the Judicial Branch Unit taking into consideration the evaluation factors set forth in the Request for Proposals and discussions pursuant to Rule 28. No other factors or criteria may be used in the evaluation.

Accordingly, the evaluation criteria set forth in the RFP must be utilized to determine the most advantageous proposals. The criteria set forth in the RFP as well as the other components of the RFP presumably are designed to enable the selection of the contractor(s) that are "most advantageous."

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Compliance with the contract award provision of the Code requires that the "ultimate authority" of the "presiding judge of each court" to select the primary provider(s) as set forth in Administrative Order No. 97-52 must be exercised in accordance with the results of the procurement process.

As to the other part of your third question, under the Code the RFP process is an appropriate method of procuring driving school services. The Code allows for the RFP process to be used if the Presiding Judge of the Superior Court (or his delegate) determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the Judicial Branch Unit. Rule 2-7-325 of the Arizona Administrative Code pertaining to the State Procurement Code, A.R.S. §§ 41-2501 through 41-2632, provides guidance. For example, an RFP is justified when it is necessary to compare differences in price, quality and contractual factors of the proposals submitted or when awarding a contract in which price is not the determining factor. The evaluation criteria and overall structure of the RFP at issue indicate that price was not a factor in determining contract award (the pricing for the service was established in the RFP). Rather, the RFP was designed to result in the selection of the most qualified schools in accordance with the evaluation criteria. Selection of the most qualified schools is in the public interest in that the education provided by the higher ranked schools is likely to be more effective and result in reduced recidivism. Therefore, the RFP process was appropriate to secure driving school services.

In answering your fourth question, based on the information presented, this Office concludes that the RFP process was conducted in compliance with the Code, and that the procurement process is binding on the Justice of the Peace Courts with the following qualification. Pursuant to Section 3.21 of the RFP, the Judicial Branch Unit retained the option to reject any and all proposals if it is determined to be in its best interest. If the Presiding Justice of the Peace, in exercising his authority to make management decisions on behalf of the Justice of the Peace Courts, were to make this determination, the public procurement could be canceled. However, as discussed above, Administrative Order No. 97-52 requires that the procurement of primary provider defensive driving schools be conducted under the applicable procurement code. Thus, to contract for primary providers, another procurement would need to be conducted. Moreover, if the cancellation and resolicitation were conducted only to circumvent the results of the first solicitation, this could provide a basis for a protest.

The RFP does not state how many proposers may be awarded a contract. Section 6.2 of the RFP provides: "The contract will be awarded by Judge Myers to a qualified firm at compensation determined to be fair and reasonable considering budgetary limitations, scope, complexity and the nature of goods and/or services. The proposal may be awarded

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in whole, by section, or geographic area as required." This Office concludes that this language allows for multiple contracts to be awarded.

In answer to your fifth question, the overall structure of this RFP, the evaluation criteria and evaluation process directs that proposals be evaluated against the specified criteria and that the most qualified proposers be awarded contracts. This evaluation and selection methodology is inherent in the competitive procurement process. The results of the procurement process at issue here provide a natural break point justifying the recommendation for awarding contracts to the four highest scoring proposers. If all eight proposers were awarded contracts, the four highest ranked proposers would have a colorable basis for protesting the result as inconsistent with the overall intent of the RFP.

Another alternative available for defensive driving school utilization exists under A.R.S. § 28-3393(A)(2), which allows traffic offenders to attend any certified defensive driving school for courts that do not have a primary provider contract.

A. An eligible person who elects to attend a defensive driving school shall attend one of the following within the time allowed by the court:

1. A defensive driving school that is a primary provider for the court having jurisdiction over the civil or criminal traffic offense.
2. If the court does not have a primary provider, any defensive driving school.

A.R.S. § 28-3393(A)(2).

Pursuant to this statute, and in response to your first question, the Justice of the Peace Courts cannot allow offenders to attend schools that were not primary providers if the courts have contracted for primary providers. If the Presiding Justice of the Peace determined that it was in the Justice of the Peace Courts' best interest not to enter into primary provider contracts, all proposals could be rejected pursuant to Section 3.21 of the RFP and the solicitation canceled. Of course, there may be significant policy or budget reasons which would make it difficult to justify a decision not to contract with primary providers.

Summary

In order to contract for primary provider defensive driving school services, the Justice of the Peace Courts must comply with the Judicial Procurement Code. It is

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advisable to award contracts to the four top ranked proposers in accordance with the results of the procurement and evaluation process.

Very truly yours,

RICHARD M. ROMLEY
MARICOPA COUNTY ATTORNEY
DIVISION OF COUNTY COUNSEL

Paul E. Golab
Deputy County Attorney

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Approved by the Opinion Review
Committee of the Maricopa County
Attorney's Office this 15th day of May,
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